IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8200 of 2006

with

SPECIAL CIVIL APPLICATION No. 8202 of 2006
to
SPECIAL CIVIL APPLICATION No. 8204 of 2006

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? No

2 To be referred to the Reporter or not ? No

3 Whether their Lordships wish to see the fair copy of the judgment ? No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? No

5 Whether it is to be circulated to the civil judge ? No

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ASIAN PAINTS INDIA LTD. - Petitioner(s)
Versus
DY.COMMISSIONER OF SALES TAX, CIRCLE 2(6) - Respondent(s)

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Appearance :
MR KH KAJI for Petitioner(s)
MR SS SHAH, GOVERNMENT PLEADER for Respondent(s)

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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 24/07/2006

ORAL JUDGMENT (Per: HON'BLE MR.JUSTICE J.M.PANCHAL)

1. By filing these petitions under Article 226 of the Constitution, the petitioner, i.e. M/s.Asian Paints India Limited, has prayed to set aside four re-assessment orders dated February 16, 2006, passed by the respondent, i.e. the Deputy Commissioner of Sales Tax, Circle-2(6), Ahmedabad, under Section 44 of the Gujarat Sales Tax Act, 1969 (“the State Act” for short) by which self-explanatory provisional assessment orders dated July 26, 1999, passed under Section 41B of the State Act are confirmed and it is directed that the amounts representing branch transfers indicated in the orders be added in the total turnover of the petitioner and the tax be levied thereon in accordance with law. The

petitioner has further prayed to quash and set aside the order dated April 5, 2006, passed by the Assistant Commissioner of Sales Tax, Division-21, Ahmedabad, by which Current Account No.28 being operated by the petitioner with the State Bank of India, Shah-e-alam Branch, Ahmedabad, is attached for non payment of Rs.7,48,94,727/= recoverable under the abovereferredto four re-assessment orders.

2. In order to appreciate the points raised by the petitioner in these petitions, it is necessary to notice the facts emerging from the record of the case, which are as under:

2.1 The petitioner is a company registered under the provisions of the Companies Act, 1956. It manufactures industrial paints as well as household paints and allied products. In the State of Gujarat, the petitioner has its manufacturing plant at Ankleshwar and branches at Narol, Sarkhej, Surat, Rajkot and Halol. The head office of the petitioner-Company is

situated at Mumbai. The petitioner is registered as a dealer, both under the State Act and the Central Sales Tax Act, 1956 (“the Central Act” for short). The old number of its certificate of registration was 20105551-GUJ-1-J410, whereas the new number is 0750001437. The Commissioner of Sales Tax has permitted the petitioner to furnish a consolidated return relating to all the places of business of the petitioner in the State of Gujarat at Ahmedabad, with reference to the above-numbered certificate of Registration.

2.2 The Sales Tax Department has created a special squad called Flying Squad for the purpose of detecting evasion of tax. The Sales Tax Officer of Flying Squad, Unit-I, discharging duties in the office of the Commissioner of Sales Tax, Ahmedabad, conducted a checking of manufacturing plant of the petitioner located at Ankleshwar on February 4, 1999. During the course of checking, he found that three transactions of branch transfers effected by

the petitioner were shady in nature. He, therefore, seized certain documents available at that time relating to those branch transfers. Thereafter, by a notice dated March 16, 1999, he called upon the petitioner to produce original documents, accounts, etc. relating to branch transfers. The petitioner gave reply dated April 4, 1999, emphasizing that the transfers of goods to its branch offices were genuine. The Sales Tax Officer again wrote a letter dated June 4, 1999, calling upon the petitioner to produce relevant documents for his perusal so as to enable him to ascertain the true nature of branch transactions effected by the petitioner. However, the petitioner did not produce the relevant documents such as original accounts, excise registers maintained at different depots of the petitioner, stock registers, the original permission sanctioning branch transfers and other collateral material for the perusal of the Sales Tax Officer, but offered further explanation by letter dated

July 2, 1999. As material documents and accounts were not furnished by the petitioner, it was not possible for the Sales Tax Officer to ascertain the correctness of the branch transfers effected by the petitioner. Therefore, he disallowed the transactions of the petitioner of industrial paints effected by the petitioner to different branches from manufacturing unit of the petitioner located at Ankleshwar, which were mentioned by the petitioner in its letter dated March 5, 1999, for the assessment years 1997-98 and 1998-99. The competent officer had reason to believe that the petitioner had evaded the payment of tax. Therefore, after taking into account all the relevant materials gathered and after giving the petitioner a reasonable opportunity of being heard, the Sales Tax Officer assessed the petitioner provisionally to the best of his judgment under Section 41B of the State Act vide orders dated July 26, 1999, and held that the amounts of following sales as indicated below were liable to tax.

Year	Amt. Under the State Act	Amt. Under the Central Act	Total
1997-98	Rs.2,28,86,300/-	Rs.5,23,00,657/-	Rs.7,51,86,957/-
1998-99	Rs.2,56,06,703/-	Rs.2,10,04,519/-	Rs.4,66,11,222/-

The competent officer thereafter determined the liability of the petitioner to pay the tax with penalty and interest as under:

Year	Amt. Under the State Act	Amt. Under the Central Act
1997-98	Rs.79,30,105/-	Rs.1,49,05,686/-
1998-99	Rs.99,09,794/-	Rs.74,04,093/-

It may be mentioned that the provisional assessment orders dated July 26, 1999, under Section 41B of the State Act were passed in respect of Ankleshwar unit of the petitioner with reference to the old certificate of registration No.20105551-GUJ-1-J410.

2.3 Though the petitioner was permitted to furnish consolidated return relating to all the places of its business in the State of Gujarat at Ahmedabad and was fully aware of the fact that it was subject to the appellate jurisdiction of Deputy Commissioner of Sales Tax, Circle-

2(6), Ahmedabad, the petitioner invoked the appellate jurisdiction of the Assistant Commissioner of Sales Tax (Appeal), Surat, on August 18, 1999, and filed appeals against the provisional assessment orders dated July 26, 1999. Before filing the appeals, the petitioner had not paid the amount of tax with penalty and interest and therefore, the appeals were admitted on condition of the petitioner depositing a total sum of rupees one crore. The petitioner had deposited the said amount by way of Challans on different dates as indicated in the application dated May 29, 2002, submitted by the petitioner. The appellate authority took into consideration the points raised by the petitioner for its consideration. The contention that the provisional assessment orders were liable to be set aside as they were contrary to the principles of natural justice was rejected by the appellate authority holding that before passing the assessment orders, show cause notice was served upon the petitioner and the

petitioner was given opportunity of hearing. Similarly, the contention that the assessing officer was not justified in not accepting the branch transfers effected from Ankleshwar unit of the petitioner was rejected by the appellate authority holding that on the basis of seized documents, the assessing officer was justified in coming to the conclusion that movement of goods from Ankleshwar plant had ended in Gujarat State itself. The contention that the assessing officer was not justified in holding that the branch transfers were effected pursuant to existing contract of sales and were therefore sales, was rejected by holding that the assessing officer was justified in coming to the said conclusion, more particularly, when the petitioner had failed to produce stock, transfer memos, 23-D registers, transport receipts of Ankleshwar Depot, test certificates, etc. In view of abovereferredto and other findings, the appellate authority rejected the appeals by reasoned order dated February 2, 2000.

2.4 Against the order dated February 2, 2000, passed by the Assistant Commissioner of Sales Tax (Appeal) 8, Surat, rejecting the appeals, the petitioner preferred second appeals before the Gujarat State Sales Tax Tribunal. Before filing the appeals, the petitioner had submitted regular consolidated return relating to all the places of business of the petitioner in the State of Gujarat for assessment years 1997-98 and 1998-99 and also claimed benefits relating to the branch transfers effected from Ankleshwar unit, which were not accepted and treated as sales while passing the provisional assessment orders under Section 41B of the State Act. To the returns, separate sheets were annexed but it was not mentioned therein by the petitioner that branch transfers effected from Ankleshwar unit were not accepted but were treated as sales or that Sales Tax Officer had passed provisional assessment orders dated July 26, 1999, under Section 41B of the State Act against the petitioner or that the petitioner

had invoked the appellate jurisdiction of the Assistant Commissioner of Sales Tax (Appeal) 8, Surat, against the orders passed under Section 41B of the State Act or that pursuant to the conditional stay order, the petitioner had deposited in all a sum of rupees one crore or that the appeals were dismissed by an order dated February 29, 2000 and got the regular assessment completed under Section 41(3) of the State Act for assessment year 1997-98, vide order dated June 30, 2001, and for assessment year 1998-99 vide order dated January 31, 2002.

2.5 When the appeals filed before the Gujarat State Sales Tax Tribunal were taken up for hearing by the Tribunal, the petitioner produced regular assessment orders passed under Section 41(3) of the State Act for the relevant assessment years for consideration of the Tribunal. The Tribunal was of the view that the provisional assessment orders had merged into the regular assessment orders made

under Section 41(3) of the State Act and therefore disposed of the second appeals filed by the petitioner by order dated March 11, 2002, as having become infructuous.

2.6 Thereafter, the petitioner submitted an application dated May 29, 2002, stating that against the orders made under Section 41B of the Act, the petitioner had deposited a sum of rupees one crore and therefore, the regular assessment orders should be rectified and excess amount should be refunded to it with interest under Section 54 of the State Act. While processing the said application, the Sales Tax Officer for the first time learnt that the provisional assessment orders under Section 41B of the State Act were passed against the petitioner and that the petitioner had deposited a sum of rupees one crore as condition precedent for entertaining appeals by the first appellate authority and that the second appeals preferred before the Tribunal were disposed of as having become infructuous.

On learning these material facts, the Sales Tax Officer was of the view that the petitioner had intentionally concealed the important facts that the provisional assessment orders were made against it and it had not claimed refund of rupees one crore with a bad intention and if the relevant facts had been brought to the notice of the assessing officer during the course of regular assessment proceedings, the regular assessment would not have been completed under Section 41(3) of the State Act, as a result of which, a good case was made out for exercise of powers under Section 44 of the State Act. However, it was noticed by the Sales Tax Officer that regular assessment orders passed under Section 41(3) of the State Act were also revisable under Section 67 of the State Act by the Commissioner of Sales Tax and if the Commissioner of Sales Tax was inclined to exercise his powers under Section 67 of the State Act, then there was no point in his exercising powers under Section 44 of the

State Act. Under the circumstances, the Sales Tax Officer addressed a detailed letter dated January 31, 2003, to the Commissioner of Sales Tax and sought his guidance whether action should be taken against the petitioner under Section 44 or Section 67 or Section 72 of the State Act. The Commissioner of Sales Tax informed the Sales Tax Officer on February 14, 2003, through administrative officer discharging duties in the office of the Deputy Commissioner of Sales Tax, Division-2, Ahmedabad, that action against the petitioner should be taken under Section 44 of the State Act.

2.7 After abovementioned clarification was made by the Commissioner of Sales Tax, the respondent issued notice dated February 18, 2003, calling upon the petitioner to show cause as to why the amounts covered by transactions of branch transfers accepted during the course of regular assessments be not subjected to tax. The petitioner gave reply and was afforded

sufficient opportunity of being heard. The respondent, by four different orders dated February 16, 2006, has upheld the self-explanatory provisional assessment orders dated July 26, 1999, passed under Section 41B of the State Act and after disallowing the amounts representing the branch transfers, as indicated in the orders, has directed to add the said amounts in total turnover of the petitioner and to recover tax thereon in accordance with law. Following the orders of the respondent under Section 44 of the State Act, the liability of the petitioner to pay the amount of tax with penalty and interest is determined at Rs.7,48,94,727/-. The petitioner did not make payment of the said amount though called upon to do so and therefore, by an order dated April 5, 2006, Current Account No.28 being operated by the petitioner with the State Bank of India, Shah-e-Alam branch, Ahmedabad, is attached.

3. It is the case of the petitioner that during the course of regular assessments for the assessment years 1997-98 and 1998-99, the petitioner had produced in original `F' Forms indicating branch transfers which were scrutinized and accepted after which regular assessments were completed under Section 41(3) of the State Act and therefore, re-assessment orders under Section 44 of the State Act which are passed without jurisdiction are liable to be set aside in view of the decision of the Supreme Court in ***Ashok Leyland Limited v. State of Tamil Nadu*** reported in ***(2004) 134 Sales Tax Cases 473***. According to the petitioner, the assessment notices were issued because of change of opinion on the part of the respondent which has totally invalidated the re-assessment orders and therefore, those orders should be set aside. The petitioner has averred that though the re-assessment orders are purportedly passed on February 16, 2006, they could not have been passed before February 19, 2006, as both, the petitioner's

officer and the Tax Consultant, had attended the office of the respondent on February 17, 2006, and February 18, 2006, whereas, the verification of the records had taken place on February 15, February 16 and February 17, 2006, and written submissions were handed over to the respondent on February 18, 2006, and as the orders in fact passed on February 19, 2006, are ante-dated, the same should be set aside. The petitioner has stated in the petitions that the respondent had issued re-assessment notices at the behest and under the directions of the higher authority, namely, the Joint Commissioner of Sales Tax, and therefore, initiation of re-assessment proceedings should be regarded as illegal and without jurisdiction. The petitioner has averred that the respondent did not decide the petitioner's objections to the assessment notices by a speaking order as required by the Supreme Court in the decision rendered in the case of ***G.K.N.Driveshafts (India) Ltd. v. Income-Tax Officer and others,*** reported in

(2003) 259 Income Tax Reports 19 and therefore, the respondent could not have passed the re-assessment orders. The petitioner has asserted in paragraph-14 of the petition that though the appeals lie against the re-assessment orders, the petitioner is entitled to invoke extra-ordinary jurisdiction of this Court under Article 226 of the Constitution as re-assessment notices were issued without jurisdiction and the respondent had failed to decide the petitioner's objections to the assessment notices by a speaking order whereas the assessment orders have been passed in total disregard of the decision of the Supreme Court in ***Ashok Leyland Limited v. State of Tamil Nadu*** (supra). Under the circumstances, the petitioner has filed the instant petitions and claimed reliefs to which reference is made earlier.

4. On service of notice, Mr.Anilkumar Harilal Thakker, who is now designated as Deputy

Commissioner of Commercial Tax and who was Deputy Commissioner of Sales Tax, has filed an affidavit-in-reply controverting the averments made in the petition. It is stated in the reply that alternative, effective remedy of filing of appeals against the re-assessment orders in terms of the statute is available and therefore, the petitions should not be entertained and should be dismissed. After narrating the facts which led to passing of four provisional assessment orders under Section 41B of the Act, it is mentioned in the reply that admittedly, the goods were manufactured at Ankleshwar, within the State of Gujarat, but they were purportedly shown as branch transfers to Maharashtra and other States though the goods were manufactured pursuant to confirmed orders of different parties as per their specifications and therefore, in view of illegal and malicious tax evasion modus operandi adopted by the petitioner, the petitioner, who has committed fraud on the revenue, is not entitled to the

reliefs claimed in the petitions. Elaborating the tax evasion method adopted by the petitioner, it is explained in the reply that first Mumbai branch of the petitioner received an order from the Reliance Industries, Jamnagar and then Mumbai branch instructed the Ankleshwar factory about having received the said order and specifically instructed the Ankleshwar factory to apply all the available resources so that the goods required by Reliance Industries at Jamnagar could be delivered before the end of January 1999, after which what were actually local sales were effected purportedly by branch transfers and from Mumbai the goods were delivered to the Reliance Industries at Jamnagar by paying 4% Central Sales Tax in Maharashtra and evading deliberately and intentionally the payment of 11% tax in the State of Gujarat. It is stated in the reply that the branch transfers do not attract any tax liability and if the sales had been directly made from Ankleshwar to Jamnagar, the State of Gujarat

would have received 15% local sales tax, payment of which was evaded by the petitioner. What is averred in the reply is that the petitioner, who is permitted to file consolidated returns, came for regular assessments including for the concerned years and got regular assessments done under Section 41(3) of the State Act without disclosing to the assessing officer about the flying squad operations or provisional assessment orders passed under Section 41B of the State Act or it having filed appeals under Section 65 of the State Act before the appellate authority at Surat or it having made necessary part payment to the tune of rupees one crore, etc. and as regular assessments under Section 41(3) of the State Act were got completed by keeping the assessing officer in dark about the earlier proceedings for the same assessment years, and by suppressing material facts, the re-assessment orders should not be regarded as having been passed without jurisdiction. It is mentioned in the reply that the petitioner had

produced regular assessment orders before the Gujarat State Sales Tax Tribunal and persuaded the Tribunal to dispose of the second appeals pending before it as having become infructuous after which, the petitioner had claimed refund and as fraud committed by the petitioner came to the knowledge of the assessing officer only then, re-assessment orders should not be regarded as illegal or contrary to the provisions laid down by the Supreme Court in ***Ashok Leyland Limited v. State of Tamil Nadu*** (supra). In the reply, it is averred that no breach of principles laid down in the case of ***G.K.N.Driveshafts (India) Ltd. v. Income-Tax Officer and others,*** (supra) is committed by the respondent. In paragraph-24 of the reply, it is asserted that the assessment orders were not ante-dated and were in fact passed on February 16, 2006, and that the petitioner had malafide given written submissions on February 18, 2006, to show that the documents were furnished for perusal though, in fact, they were never furnished before the assessing

officer for his perusal. It is further explained in the reply that out of the total turnover of branch transfer transactions claimed by the petitioner, the branch transfers only to the extent of 2.39% and 1.42% have been disallowed for the assessment years 1997-98 and 1998-99 respectively and rest of the branch transfers have not been disturbed. It is maintained in the reply that certain branch transfers were disallowed because the petitioner could not supply original documents to substantiate the same.

5. The petitioner has filed affidavit-in-rejoinder on May 30, 2006, controverting the averments made in the affidavit-in-reply of Mr.Anilkumar H.Thakker and asserted that as regular assessment proceedings under Section 41(3) of the State Act were going on, there was no question of the petitioner bringing to the notice of the assessing officer the earlier provisional proceedings. By and large, the petitioner has reiterated what is stated

in the petitions and therefore, this Court is of the opinion that it is not necessary for the Court to refer to the same in detail.

6. During the course of hearing of the petitions, the petitioner was permitted to amend the petition to enable it (1) to plead additional ground of challenge, namely, that re-assessment orders were bad as the assessing officer had decided to take action at the behest of his superior and (2) to challenge attachment order dated April 5, 2006. The respondent has therefore filed affidavit-in-reply to the rejoinder and amended petitions. In the additional reply, it is mentioned by the respondent that the notices of re-assessment dated February 18, 2003, were issued in Form-37 which were received by the petitioner on February 19, 2003 and that the petitioner was afforded opportunity of being heard. Again, in the reply, it is emphasized that the orders were passed on February 16, 2006, and that the orders were dispatched to

the petitioner on February 17, 2006, after making necessary entry in the assessment register and dispatch register. What is highlighted in the additional reply is that the notices for re-assessment were not issued at the behest of higher authority but a detailed note prepared was submitted before the higher authority in exercise of better governance and good practice. After asserting that at no point of time has the higher authority influenced the appropriate authority, it is maintained in the reply that letter dated March 14, 2003, cannot be construed as higher authority having influenced the decision of the appropriate authority. By filing additional reply, the respondent has prayed that the petitions, which have no merit, should be dismissed.

7. Mr.K.H.Kaji, learned counsel for the petitioner, contended that `F' Forms produced in the original were scrutinized and accepted during the course of regular assessment

proceedings as branch transfers and therefore, in view of the decision of Supreme Court in ***Ashok Leyland Limited v. State of Tamil Nadu*** (supra), the re-assessment orders which are passed without jurisdiction should be set aside. According to the learned counsel for the petitioner, it was not necessary for the petitioner to bring to the notice of the assessing officer who completed regular assessments that earlier provisional assessment orders had been passed or that the petitioner had challenged the same before the appellate authority at Surat etc. and as the petitioner had not concealed anything and had furnished necessary particulars, the powers under Section 44 of the State Act could not have been exercised on mere change of opinion. It was argued that re-assessment notices were issued by the respondent at the behest and under the directions of the higher authority, namely, the Joint Commissioner of Sales Tax, and therefore, initiation of re-assessment proceedings should be regarded as illegal and

without jurisdiction. It was emphasized that "reason to believe" must be of the officer issuing assessment notices and as in this case, reason to believe was formed by the respondent at the behest of his superior, the re-assessment orders should be set aside. It was pleaded that by manipulating the records, the respondent had passed ante-dated re-assessment orders though they were in fact passed on February 19, 2006, and therefore, the reliefs claimed in the petitions should be granted. It was contended that the petitioner had raised objections to the validity of re-assessment notices but the respondent had failed to decide the objections by a speaking order and therefore, in view of the decision of the Supreme Court in ***G.K.N.Driveshafts (India) Ltd. v. Income-Tax Officer and others,*** (supra), the re-assessment orders should be set aside. It was asserted that the points urged at the Bar in support of the petitions relate to jurisdiction of the respondent to pass re-assessment orders and

therefore, they should be decided by the Court. It was emphasized that the point whether the respondent had issued re-assessment notices at the behest of his superior should not be left to be decided by appellate authority but should be decided by this Court and therefore, the petitioner should not be non-suited on the ground of alternative remedy available under the statute.

8. Mr.Sunit S.Shah, learned Government Pleader for the respondent, at the outset stressed that all the points urged by the petitioner can be gone into and decided effectively by the appellate authority and as effective, alternative, statutory remedy of filing appeals is available to the petitioner, the instant petitions should not be entertained by the Court. The learned Government Pleader further contended that during the course of regular assessment proceedings, it was never disclosed by the petitioner that the premises

of the petitioner situated at Ankleshwar were subjected to surprise check by Sales Tax Officer of Flying Squad or that the provisional orders of assessment were passed under Section 41B of the State Act or that against those orders, the petitioner had filed appeals invoking appellate jurisdiction of the Assistant Commissioner of Sales Tax at Surat or that the petitioner was asked to make payment of rupees one crore as a condition precedent for entertaining the appeals or that the petitioner had deposited a sum of rupees one crore pursuant to the conditional order passed by the first appellate authority or that the appeals were dismissed by the first appellate authority against which second appeals were filed before the Tribunal which were pending and as the petitioner had failed to disclose material and relevant facts and suppressed them, the respondent was justified in passing the re-assessment orders notwithstanding the scrutiny and acceptance of `F' Forms. It was pleaded on behalf of the

respondent that important and relevant facts, namely, (i) that provisional assessment orders were passed in case of the petitioner under Section 41B of the State Act, (ii) that the petitioner had made part payments against orders under Section 41B of the State Act, (iii) that the petitioner had filed appeals before the Gujarat State Sales Tax Tribunal against the orders passed under Section 41B of the State Act, and (iv) that the appeals were disposed of by the Tribunal holding that provisional assessment orders had merged into regular assessment orders, came to the notice of the respondent for the first time when the petitioner made application dated May 29, 2002, praying to rectify regular assessment orders and to refund excess payment made by it with interest under Section 54 of the State Act, and therefore, in view of suppression of material facts by the petitioner, the respondent was justified in entertaining a reasonable belief that the turnover of specified sales chargeable to tax had escaped

assessment. According to the learned counsel for the respondent, re-assessment orders passed by the respondent cannot be regarded as having been passed without jurisdiction more particularly in view of suppression of material facts by the petitioner before the assessing officer who was dealing with regular assessment proceedings. It was contended that if true and relevant facts had been disclosed by the petitioner at the time of regular assessment proceedings, the assessing officer would not have accepted `F' Forms indicating certain branch transfers and therefore, re-assessment proceedings cannot be termed as proceedings initiated without jurisdiction. It was argued that the record does not indicate that the respondent had issued re-assessment notices either at the behest of or on the directions of his higher officer and therefore, the re-assessment proceedings are not liable to be interfered with. It was emphasized that in view of the contents of application dated May 29, 2002, the respondent

was satisfied that material facts were suppressed by the petitioner and those material facts were not taken into consideration by the assessing officer when the petitioner got regular assessments completed under Section 41(3) of the State Act and therefore, a good case was made out for exercise of powers under Section 44 of the State Act, but it was also noticed by the respondent that regular assessment orders could be revised under Section 67 of the Act and therefore, by addressing a letter dated February 1, 2003, the respondent had tried to know whether the Commissioner of Sales Tax would like to exercise powers under Section 67 of the Act or the powers of re-assessment under Section 44 of the State Act should be exercised, which can, in no circumstances, be termed as exercise of powers by the respondent at the behest of his superior, and therefore, re-assessment orders are not liable to be set aside. It was argued that “reason to believe” of the respondent and application of mind to

the facts of the case by the respondent is evident from the contents of letter dated February 1, 2003, and it is wrong to argue that the respondent had issued re-assessment notices at the behest of his superior. According to the learned counsel for the respondent, the letter dated February 1, 2003, was addressed by the respondent to his superior officer for better governance and good practice to which reply dated February 18, 2003, was given which can never be construed as direction by a superior officer of the respondent to the respondent that the power should be exercised in a particular manner as a result of which belated challenge to the re-assessment notices should not be accepted by the Court. The learned counsel for the respondent extensively referred to paragraph after paragraph from the additional affidavit to emphasize that the orders of re-assessment were neither passed on February 19, 2006, nor were ante-dated but in fact, were passed on February 16, 2006, and pleaded that

the petitioner is not entitled to the reliefs claimed in the petitions on the basis that re-assessment orders were ante-dated. Lastly, it was argued that after receipt of notices of re-assessment, the petitioner had not raised any objection that the respondent had no jurisdiction to issue notices and therefore, the respondent was not obliged to pass a reasoned order dealing with the objection before passing the assessment orders and therefore, re-assessment orders are not liable to be set aside on the basis of principle of law propounded by the Supreme Court in the case of ***G.K.N.Driveshafts (India) Ltd. v. Income-Tax Officer and others,*** (supra). The learned counsel for the respondent emphasized that there is no substance whatsoever in the petitions and therefore, they should be dismissed by the Court.

9. This Court has heard Mr.K.H.Kaji, learned counsel for the petitioner and Mr.Sunit S.Shah, learned Government Pleader for the

respondent, at length and in great detail. This Court has also considered the documents forming part of the petitions.

10. The contention that `F' Forms produced in the original were scrutinized and accepted during the course of regular assessment proceedings as branch transfers and therefore, in view of the decision of Supreme Court in ***Ashok Leyland Limited v. State of Tamil Nadu*** (supra), the re-assessment orders should be regarded as having been passed without jurisdiction has no substance. In ***Ashok Leyland Limited v. State of Tamil Nadu*** reported in ***(2004) 134 Sales Tax Cases 473***, after interpreting Section 6-A of the Central Sales Tax Act, 1956, as amended by the Central Sales Tax (Amendment) Act, 2001, the Supreme Court has held that Section 6-A of the Central Act, as amended, provides for a conclusive proof, except on a limited ground. According to the Supreme Court, the order of an authority under Section 6-A is conclusive for

all practical purposes and the re-opening of an assessment is permissible only on limited grounds, such as fraud, collusion, misrepresentation or suppression of material facts or giving or furnishing of false particulars, since in such cases, the order would be vitiated in law. The Supreme Court has further explained that when the order passed in terms of sub-section 2 of Section 6-A is found to be illegal or void ab-initio or otherwise voidable, the assessing officer derives jurisdiction to direct re-opening of the proceedings. It is further ruled by the Supreme Court in the said decision that mere change in the opinion of the assessing officer or to have a re-look at the matter would not confer any jurisdiction upon him to get the proceedings re-opened.

11. In the light of abovereferredto principles, the question posed for consideration of this Court, whether the respondent was justified in passing the re-assessment orders, will have to

be considered. It is well settled that if an order is obtained by misrepresentation of facts or fraud, it cannot be said that there was true and fair disclosure of facts. The contention that as Books of Accounts and other evidence including Form-F, were produced, there was no duty on the petitioner to disclose further facts which on due diligence, the assessing officer might have discovered, cannot be accepted because omission to bring to the assessing officer's attention those relevant facts will amount to omission to disclose fully and truly all material facts necessary for assessment. So far as primary facts are concerned, it is the duty of the assessee to disclose all of them. It is well settled that when an assessee files return, it is his duty firstly, to disclose facts; secondly, those which are material; the disclosure must be full and fourthly, true. Assessment can be re-opened on assessing officers' reason to believe regarding, based on specific reliable and relevant information

subsequently received by him which tends to expose untruthfulness or inadequacy of the material disclosed by the assessee on the basis of which original assessment was made. Sufficiency of assessing officer's belief is not justiciable though the belief can be questioned by assessee on the ground of lack of bonafides and irrelevancy.

12. So far as the facts of the instant case are concerned, it is not in dispute that the premises of the petitioner at Ankleshwar were subjected to surprise check by the Sales Tax Officer of the Flying Squad discharging duties in the office of the Commissioner of Sales Tax, Ahmedabad on February 4, 1999. It is not in dispute that during the course of the surprise visit, certain documents were seized as the officer was not satisfied about the genuineness of certain branch transfers. It is also not in dispute that the petitioner was called upon to produce original documents to substantiate the branch transfers but the

petitioner did not produce the same for perusal of the officer. Under the circumstances, the competent officer, after giving opportunity of being heard to the petitioner, had passed the provisional assessment orders under Section 41B of the Act. The petitioner is permitted by the Commissioner of Sales Tax to file consolidated return in respect of all places of its business in Gujarat at Ahmedabad and was aware of the fact that it was subject to the appellate jurisdiction of Deputy Commissioner of Sales Tax, Ahmedabad. Inspite of this, the petitioner invoked the appellate jurisdiction of the Assistant Commissioner of Sales Tax (Appeals) 8 at Surat and challenged the validity of provisional assessment orders passed under Section 41B of the State Act by filing four appeals. It is not in dispute that the petitioner was called upon to make part payment of its liability towards tax as condition precedent for entertaining the appeals and that the petitioner had complied

with the said order. It is also not in dispute that the appeals were ultimately dismissed by the first appellate authority and therefore, the petitioner had approached the Gujarat State Sales Tax Tribunal by way of filing second appeals. All these relevant facts were never brought to the notice of the assessing officer when proceedings for regular assessments were undertaken by the officer. If these facts had been brought to the notice of the assessing officer, the assessing officer would not have accepted `F' Forms submitted by the petitioner indicating branch transfers and would have been put on his guard. However, keeping the assessing officer in complete dark, the petitioner got regular assessment completed under Section 41(3) of the State Act. When the provisional assessment takes place under Section 41B of the State Act, the provisional assessment has to be taken into consideration while passing regular assessment orders. It is relevant to notice that the first appellate authority had upheld the

validity of the four provisional assessment orders passed under Section 41B of the State Act and the appeals were dismissed vide orders dated February 2, 2000. Even the Gujarat State Sales Tax Tribunal had disposed of the appeals filed by the petitioner as having become infructuous and had not interfered either with the provisional assessment orders passed under Section 41B of the State Act or the appellate orders dismissing the appeals of the petitioner. The provisional assessment order passed under Section 41B of the State Act has got to be taken into account while passing regular assessment order and it can either be upheld or be set aside or be modified but cannot be ignored or suppressed as was done by the petitioner. Here in this case, the petitioner did not bring to the notice of the assessing officer that provisional assessment orders were passed in its case under Section 41B of the State Act and that they were required to be taken note of while passing regular assessments under Section 41(3) of the

State Act. The narration of above facts would indicate that the petitioner had suppressed facts from the assessing officer and got the regular assessments done under Section 41(3) of the State Act in a clandestine manner. Under the circumstances, this Court is of the firm opinion that the respondent was justified in initiating proceedings for re-assessment as contemplated by Section 44 of the State Act. The assessment orders passed under Section 44 of the State Act cannot be regarded as having been passed without jurisdiction, more particularly, when material, correct and true facts were never brought by the petitioner to the notice of the assessing officer at the time of regular assessment proceedings. Thus, this Court does not find any substance in the first contention raised on behalf of the petitioner and the same is hereby rejected.

13. The plea that the respondent exercised powers at the behest and dictate of his superior officer and therefore, the re-assessment

orders challenged in the petitions should be set aside is devoid of merits. From the record of the case and more particularly, from the contents of letter dated February 1, 2003, which is produced by the respondent along with the affidavit-in-reply, it is evident that the respondent was of the firm opinion that relevant and material facts were not brought to the notice of the assessing officer at the time of completing regular assessments and therefore, a case was made out for exercising powers under Section 44 of the State Act. However, it was noticed by the respondent that the regular assessment orders passed under Section 41(3) of the Act were also revisable by the Commissioner of Sales Tax under Section 67 of the State Act and if the Commissioner of Sales Tax was inclined to exercise his powers under Section 67 of the State Act, there was no point in his exercising powers under Section 44 of the State Act. Therefore, the respondent addressed a letter dated February 1, 2003, to the Commissioner of Sales Tax

pointing out that the regular assessment orders passed under Section 41(3) of the State Act could be dealt with either under Section 44 of the State Act or under Section 67 of the State Act or under Section 72 of the State Act and sought his guidance as to which course should be adopted. The averments made in the affidavit-in-reply of the respondent read with relevant documents produced therewith indicate that the Commissioner of Sales Tax applied mind and thereafter informed the respondent that necessary action should be taken under Section 44 of the State Act. The communication dated February 14, 2003, is produced by the respondent along with its affidavit filed to the amended petition. By the said letter, the respondent was informed that appropriate action should be taken under Section 44 of the State Act and that the Commissioner of Sales Tax should be informed accordingly. As already observed earlier, a bare reading of letter dated February 1, 2003, makes it very clear that after application of mind to the facts of

the case, the respondent had already formed an opinion that a good case was made out for exercise of powers under Section 44 of the State Act. Under the circumstances, the letter dated February 14, 2003, cannot be construed as a direction from the Joint Commissioner of Sales Tax to the respondent to exercise powers under Section 44 of the State Act. The record does no indicate in any manner that the respondent has exercised powers either at the behest of the Joint Commissioner of Sales Tax or on the dictate of any other officer. The decision to exercise powers under Section 44 of the State Act was that of the respondent himself and of no other officer. Under the circumstances, neither the notice issued for re-assessment nor the re-assessment orders which are challenged in the instant petitions can be regarded as bad in law nor are they liable to be set aside. Thus, this Court does not find any substance in the second contention raised on behalf of the petitioner and therefore, the same is hereby rejected.

14. It may be mentioned that initially, as noticed earlier, two additional contentions, namely that the orders under Section 44 of the State Act were ante-dated and that the objection raised by the petitioner to the re-assessment notices were not decided by a speaking order, were also argued by the learned counsel for the petitioner, but after looking to the contents of the two affidavits-in-reply filed by the respondent and the contents of the documents produced alongwith the replies, the learned counsel for the petitioner has not pressed the same for consideration of the Court. Under the circumstances, those two points have not been dealt with by this Court while disposing of these petitions.

15. No other point has been urged in support of the present petitions. As this Court does not find substance in any of the two contentions raised by the learned counsel for the petitioner, the petitions, which lack merits, are liable to be dismissed.

16. It may be mentioned that while disposing of the petitions, this Court has taken into consideration only the points of jurisdiction which were raised by the petitioner for consideration of this Court and has not gone into the merits of the case, namely, whether in fact branch transfers were effected by the petitioner or not etc. and the points on merits will have to be gone into by the appellate authority, if appeals are filed against the re-assessment orders passed under Section 44 of the State Act which are impugned in the instant petitions. Mr.Sunit S.Shah, learned Government Pleader, on instructions from Mr.Anilkumar Harilal Thakker, Deputy Commissioner of Commercial Tax, who is personally present in the Court, states at the Bar that if appeals are filed against the re-assessment orders passed under Section 44 of the State Act within four weeks from today, the respondent shall not resist the applications for condonation of delay which may be filed by the petitioner.

17. For the foregoing reasons, all the four petitions fail and are dismissed. Notices are discharged. There shall be no order as to costs.

(J.M.Panchal, J.)

(Smt.Abhilasha Kumari, J.)

(sunil)